IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 851 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
ALIMAHMAD ISMAIL & 4 - Opponent(s)

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Appearance :
Mr.K.C.Shah, APP for Appellant(s) : 1,
MR KB ANANDJIWALA for Opponent(s) : 1 - 4.
NOTICE UNSERVED for Opponent(s) : 5,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 12/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. By means of filing the present appeal under Section 378 of the Code of Criminal Procedure, 1973, the State has assailed the order of acquittal passed by the learned Additional Sessions Judge, District Kachchh at Bhuj in Sessions Case No.8 of 1985 decided on 31.3.1986.

2. By the judgment under challenge, learned trial Judge acquitted the accused from the charge of offences punishable under Sections 147, 148, 149, 302, 324, 325, 323, 504 and 506(2) of Indian Penal Code (hereinafter referred as “the IPC” for short).

3. In the present case, initially, the charge was framed but, thereafter, it was altered and each accused have been charged for each distinct offence they have allegedly committed. It is on record that accused No.5 had expired on 1st September, 2001 and, therefore, the appeal shall have been dealt with accordingly treating it abatted qua respondent No.5 (original accused No.5).

4. Learned APP Mr.K.C.Shah has taken us through the entire judgment and main grounds of challenge mentioned in para 5 of the memo of the appeal and has pointed out error that has been allegedly committed by the learned trial Court at the time of recording the finding of acquittal. One of the backbones of submissions of Mr.Shah before us is that the learned trial Judge has not applied his mind after appreciating the evidence of P.W.12 - Exh.40 Dr.R.B.Keshrani that accused who had given blow on the head of the deceased could have been held guilty of some lesser offence than the offence under Section 302 of IPC and in the same way, other accused persons who have caused injuries to PW Mariam and PW Ayesha also could be held guilty for lesser offence that assailants individually had committed applying the principle of minimum liability.

5. During the course of trial, the prosecution has examined 4 injured witnesses and their evidence has been discarded by the learned trial Judge mainly on the ground that there are certain contradictions in their evidence and they have attempted to keep curtain on some material part of the story of the incident that had occurred on 22nd October, 1984 in

the early hours at about 9.30 a.m., especially when these injured witnesses have not satisfactorily explained the injuries that were found on the bodies of the present accused makes the evidence of the injured witnesses unreliable. Learned trial Judge has also observed erroneously, according to Mr.Shah, that defence plea developed by making suggestions to the prosecution witnesses and by putting defence theory in the statement given under Section 313 of Criminal Procedure Code is also one of the probabilities emerging from the evidence on record and, therefore, the accused are entitled to the benefit of acquittal and it would not be safe for the Court to conclude that the prosecution has successfully proved the charges beyond the reasonable doubt.

6. To appreciate the say of the appellant State, we would like to state the basic case that was placed before the trial Court in nutshell. In para 2 of the memo of the appeal, the appellant state has narrated the facts of the prosecution in brief and it would be convenient to reproduce the relevant part of para 2 of the memo of appeal because, according to us, it covers the story of the case of the

prosecution.

> “The accused Nos.1 to 4 are brothers. Accused No.5 has a cement pipe factory at Bhuj. Accused Nos.1, 2 and 4 are working in the said factory. Accused No.3 is working in the Gujarat Electricity Board at Bhuj. According to the prosecution, the parties had a dispute about the way from the plot, from which a chapter case was filed, but afterwards, it was compromised. According to the prosecution, on the previous evening of the day of incident i.e. 22.10.1984 there was a quarrel between the ladies of the parties. As a result of the said quarrel, when the deceased had gone in the morning of the incident to the public latrine, the accused surrounded the deceased, armed with iron rod, pipe and sticks. According to the prosecution, accused no.1 gave blow on the head of the deceased Mamad Osman, who immediately fell down on the ground on account of the blow. The said Mamad Osman raised shouts, Mamad Jusab, who was going on his cycle to his job, on hearing the shouts, had seen the incident. On hearing the shouts Umar Osman and Abdul Sattar Jusab came

running. Accused no.2 gave iron rod blow on the head of Umar Osman. Accused no.3 gave stick blow to Abdul Sattar and he fell down. The said three persons Umar Osman, Mamad Osman and Abdul Sattar fell down and accused gave kicks with legs. At that time, Osman Umar, Abdulla Osman, Mariyambai Jusab and Misabai Osman came there. Accused No.3 gave stick blow to Mariyambai on her hand. Accused No.4 gave stick blow to Misabai on her head and back. Accused No.1 gave iron rod blow on the head of Osman Umar. Accused No.5 gave physical beating to Abdulla Osman and sat on his body. All these victims who were beaten shouted and, therefore, the accused ran away. The injured were removed to J.K.General Hospital. Mamad Jusab gave FIR to Bhuj City Police Station."

7. It is the say of the prosecution that injured Mamad Osman during the treatment was operated and after operative treatment, when he was in the hospital succumbed to the injuries caused in the incident. In the entire incident, the other persons who have been examined by the prosecution i.e., (i) Osman Umar, (ii) Mariyam Jusab and (iii) Ayesha Osman

had sustained injuries and the prosecution had proved the nature of injuries sustained by these witnesses in the incident. The following role is assigned and it is alleged that all these over acts of the accused persons were in the capacity of the members of unlawful assembly. So, all the accused persons are constructively liable for each wrong committed by them even in their individual capacity. The alleged over acts are (i) accused no.1 had allegedly inflicted the blow on the head by iron rod to deceased Mamad Osman. He also gave blow with iron rod on the head of P.W.8 - Osman Umar Exh.24, (ii) accused no.2 gave blow with iron rod on the head of Umar Osman - P.W.3 Exh.13 (iii) accused no.3 gave stick blow on the head of Abdul Sattar Jusab - PW 4 Exh.14. He also gave stick blow on the hands of Mariyam Jusab – PW 6 Exh.22, (iv) accused no.4 gave stick blow on the back of PW 5 Ayesha Osman – mother of the deceased Exh.15 and (v) accused no.5 had given kick and fist blow to PW 7 Abdulla Osman - Exh.23.

8. The complaint is filed by PW 2 - Mamad Jusab. He is not the eye witness. In the same way, one another witness P.W.9 Amad Jusab examined by the prosecution is also eye witness to the incident but

had not sustained any injuries.

9. Mr.K.C.Shah has taken us through the evidence of all the witnesses. However, he has concentrated his arguments mainly on the evidence given by the injured witnesses and the complainant whose presence at the time of scene of incident, according to Mr.Shah, was natural. It is emerging from the evidence that the accused as well as complainant's side are residing in the same area or in the minimum neighbouring area known as Jyesthanagar of town Bhuj. It is not a matter of dispute that the witnesses examined by the prosecution and the deceased belong to one family except P.W.9 Exh.25 Amad Jusab. P.W.3 Umar Osman and P.W.7 Abdulla Osman are real brothers of the deceased Mamad Osman. P.W.8 Osman Umar is the father of deceased and P.W.6 Mariyam Jusab is the real aunt of the deceased i.e., wife of Jusab Umar. The complainant Mamad Jusab is the first cousin (uncle's son of deceased Mamad Osman). In the same way, P.W.Ismail Jusab and Abdul Sattar Jusab are also first cousin and real brother of the complainant Mamad Jusab. According to Mr.Shah, learned trial Judge ought not to have viewed the evidence of these

witnesses with any doubt or suspicion merely because they belong to one family and related inter-se. When the injured witnesses are getting corroboration and their presence at the time of scene of occurrence is found natural, then this Court should reverse the finding of acquittal and should convict all the accused persons saying that the prosecution has successfully established the charges beyond doubt. In the alternative, according to Mr.Shah, if the Court is of the view that the presence of accused nos.3 and 5 at the time of scene of offence probably was not there and that is how acquittal saying that the evidence against these two accused persons are not of cogent nature, then rest of three accused should be held guilty for each wrong that they have committed qua injured, deceased injured and other injured witnesses, but, at least, according to Mr.Shah, this is not a case of acquittal. However, the learned trial Judge has acquitted the accused. This is a case of improper and incorrect appreciation of evidence and it was the duty of the Court to ignore minor contradictions or omissions that are being found in the evidence of witnesses saying that they are not very material and these contradictions and conflicting evidences do not go to the root of the

entire prosecution story.

10. On the other hand, Mr.Anandjiwala has strongly supported the order of acquittal and it is submitted that the learned trial Judge, after detailed appreciation of the oral as well as documentary evidence led by the prosecution, has recorded correct finding of acquittal. There is no element of either perversity or illegality in the finding. He has also taken us through the relevant part of the evidence of injured witnesses and the nature of contradictions that have been mentioned specifically by the learned trial Judge while appreciating the evidence of each eye witness examined during the course of trial. He has also taken us through the evidence of P.W.10 and 11 who were examined to prove the crucial panchanamas which are allegedly drawn under Section 27 of the Indian Evidence Act. Only one witness Abdul Gafar Mamad examined to prove four discovery panchanamas i.e. Exhs.28 to 31 who has not supported the case of the prosecution. On the contrary, placing reliance on the deposition of PW - Pruthvising and Sangramji, Mr.Anandjiwala has argued that the accused persons were arrested by the police on 22nd October, 1984 at

about 1.40 p.m., meaning thereby, on the date of incident, they were arrested in couple of hours. The accused had not developed any tendency to abscond and they were available. When they were arrested, three out of five accused persons i.e. Accused nos.1, 2 and 4 were found with injuries. By reading document Exh.76 - N.C. registered by the police, Mr.Ananjiwala has argued that injuries found on the accused persons at the time of their arrest, panchanama proved by P.W.11 Exh.32 - Pravinsinh were required to be considered in the background of N.C.-Exh.76 and the learned trial Judge, therefore, has rightly observed that it probablised the defence. Of course, Mr.K.C.Shah and Mr.Anandjiwala both have placed their reliance on the medical evidence led during the course of trial of Dr.Ramji Bhanji Keshrani - Exh.40 and Suresh Kanjibhai Parekh P.W.15 - Exh.56 as well as of Dr.Jagdish Vishwanath Dave P.W.17 - Exh.64. It is argued by Mr.Anandjiwala that accused no.1 had sustained injuries on his head and back portion. In the same way, accused no.4 had also sustained injuries on the head and accused no.2 had sustained injuries on his left hand and back. The case of the prosecution is that when the deceased was proceeding towards the public toilet to reply the

call of nature with plastic water jug in one of his hands, he was intercepted and assaulted by accused no.1. On the other hand, the stand of the accused is that wife of accused no.1 had delivered a baby (girl child) in the hospital on the previous evening i.e. 21st October, 1984 and, therefore, he was proceeding towards the hospital to pay visit to his wife and to see the newly born child in the early morning at about 7.30 a.m., on two wheelers described as Mini Rajdoot. At that time, accused no.1 was intercepted by the deceased and was given blow with wooden log and by listening shout of accused no.1, his two real brothers had rushed to his rescue. These two were also assaulted and given blow with hard and blunt substance. The close relative of the first assailant Mamad also had reached to the very spot. Thereafter, all the accused had left the place to save themselves. The motor cycle was also given blow and, therefore also, it was damaged. The glass of the head-light and clutch etc. were broken and by leaving that motor-cycle at the spot of incident, accused no.1 had left the place with his two brothers. This motor-cycle was found at the very spot of incident is one of the undisputed fact and it was lying at the time of drawing the panchanama of scene of

occurrence. The map prepared by the Revenue Circle is available on record and learned Judge had considered the topography of the place.

11. Mr.Anandjiwala submitted that on close reading of the evidence of the Civil Surgeon Dr.Jagdish Vishwanath Dave in the background of the evidence given by Dr.Kesrani who had performed the postmortem, one impression is created that probably the deceased had died not because of injuries that he had sustained in the incident in question, but because of external reason, may be because of surgery that was performed, the deceased succumbed because there is no nexus between the external injury that was allegedly inflicted on the deceased and the cause of death that was noticed by Dr.Kesrani.

12. We have given our thoughtful consideration to various aspects that have been brought to our notice by the counsel appearing for the parties, especially learned APP, because one of his arguments is that whether the judgment can be said to have been erroneous because it was possible for the Court to link the accused with the crime relying on the evidence of the injured witnesses. Each injured

witness in the present case corroborates the other and there are no material contradictions qua basic facts that they have stated before the Court. The Court should not try or expect to find out corroboration from the independent evidence and the case of the prosecution can be expected from the evidence of close relative and where the beginning is close relative, the duty of the Court is to scan the evidence closely. The presence of such relative at the spot of incident is natural and if no independent witness is otherwise available, then in these type of cases, the Court can acquit the accused on appreciation of the evidence of a person who is partition witness. On close reading of the judgment under challenge, it is clear that the learned trial Judge has considered all these aspects that have been placed before us by Mr.Shah. The case of the State was placed well before the trial Court. The written arguments submitted by the learned APP have been considered thoroughly and the learned trial Judge has observed that each injured witness has attempted to put curtain on certain important aspects of the entire incident that had occurred and they are not unfolding the true story. The Court was assisted by the detailed arguments submitted by the accused Nos.1

to 4.

13. For recording acquittal, learned trial Judge has dealt with each charge separately framed with detailed observation and has also considered motive of the crime that was half-heartedly placed before the trial Court. On plain reading of the judgment, according to us, the following material aspects are found which can be said to be undisputed facts.

(1) The accused and the complainant's side are residing in Jyesthanagar or adjacent locality and thereby they are neighbour.

(2) The deceased and the witnesses examined by the prosecution who have been posed as eye witnesses to the incident are close relatives.

(3) PW 9 Amad Jusab, of course, is not the relative, but he is serving as Talati-cum-Mantri i.e., under the establishment of the District Panchayat and the deceased was also Talati-cum-Mantri and this witness PW 9 is not residing in the area which can be said to be just adjacent to the place of incident.

(4) The accused persons had also sustained injuries in the incident in question i.e., in the same transaction of event, but the prosecution has not explained the injuries that were found on the bodies of three accused persons, i.e., accused Nos.1, 2 and 4. The accused No.1 had lodged one complaint and that has been registered as NC complaint, but it is observed and held by the trial Court that the facts narrated by the accused No.1 before the police disclose cognizable offence and the police ought to have registered the FIR and this aspect was not even seriously assailed before the trial Court by the learned Public Prosecutor.

(5) In the FIR Exh.77 time and place of incident are shown to be 7.30 a.m., on 22.10.1984, but the FIR was lodged on 9.50 a.m., after admission of the injured in the hospital and there is controversy that which side either accused or complainant had reached to the Police Station first.

(6) Mini-Rajdoot motor cycle of accused No.1 was found lying damaged with broken head-light glass etc., at the spot of incident and the body of the deceased was lying at some distance from the motor cycle.

(7) The wife of accused No.1 had delivered a baby child in the Maternity Home on the previous evening and this fact brought by the accused on record has not been seriously disputed by the prosecution.

(8) It is not the case by the prosecution of free-fight between the accused and complainant's side and it is not pleaded that all the witnesses including deceased were together when the deceased was first assaulted by accused No.1 with the iron rod.

(9) The complainant is not the injured witness and claims to be a person who had reached to the place from where he could be able to see / visualize the act of assault by accused No.1 to the deceased. He claims that he was present. Thereafter, two witnesses had reached

to the spot i.e. PW 3 Umar Osman (Exh.13) and PW 4 Abdul Sattar (Exh.14) and thereafter remaining four witnesses had reached at the place of incident i.e. (1) Ayeshabai Osman (Exh.15), (2) Mariambai Salemamad Jusab (Exh.22), (3) Abdulla Osman (Exh.23) and (4)Osman Umar (Exh.24).

(10) PW 9 Amad Jusab Exh.25 is not named in the FIR and it is not the say of the prosecution initially that he is also the witness to the incident.

(11) Considering the document at Exh.76 the presence of three accused persons were there at the place of incident and in view of the injuries found on the bodies of these three persons, their availability and participation do not remain a matter of serious dispute.

(12) There is no formal recovery form the place of incident of plastic container that the deceased was allegedly carrying with him, as he was going to reply the call of nature.

(13) The house of the deceased and other

close relative including the uncle etc. have their own toilets in their residence. The deceased injured was admitted in the hospital at about 8.20 a.m., on 22nd October, 1984 and at that time, two injuries were found on head; one was CLW on right fronto parietal region admeasuring 6 cm x 5 cm x bone deep and the second injury was CLW on the right side temporal region admeasuring 5 cm x 5 cm x bone deep and the certificate as to these two injuries was given by Dr.Kesrani at Exh.41 and none of these two injuries have been found fatal according to the Doctor who had performed postmortem.

(14) The injured was operated on 22nd October, 1984 by the General Surgeon who was not Neuro Surgeon and bore-hole was made in the skull of the injured Mamad Osman and it was found of larger size than required as per the Doctor who had performed the postmortem.

14. Learned trial Judge, while appreciating the evidence of all injured witnesses, has recorded the nature of injuries that were found on the bodies of the concerned witness and the injury certificates of

these witnesses have been proved by Dr.Kesrani. The injury certificates of Jusab - injured witness, PW Abdul Sattar, Osman Umar, Mariyam, Ayesha Osman, Umar Osman and Abdul Osman are at Exhs.43, 44, 46, 47, 48 and 49 respectively.

15. The Court is aware about the observations made by this Court in the case of State of Gujarat Vs. Panubhai @ Paniyo Kelaji Bhil and another, reported in **1991(1) GLH 85** wherein this Court has observed about various angles from which the evidence of injured witness should be scrutinized closely. The observations made in para 14.4 of this decision are indicating and it says that while appreciating the evidence of injured witness, the Court should ascertain,

(1) Whether the alleged injury was received in the course of the same transaction incident only?,

(2) Whether the accused were previously known to the injured ?,

(3) If not, whether the accused was distinctly described in previous statement before the

police?,

(4) Whether there was sufficient light at the time and place of the incident to identify the accused, and

(5) Whether the injury so found on the person of the witness, rule out a case of a self-inflicted injuries.

The Court has observed that injured witness passing these four tests carries with him an in built guarantee of truth, and that in that case, the Court can certainly place implicit reliance upon such evidence. If these tests are applied, then whether it is possible for us to observe that the evidence of eye witness should be accepted as a whole truth. The accused can be convicted, according to us, even after applying this test still there is a scope for the Court to observe that the evidence of such witness is not found reliable or wholly trustworthy. In the present case, the question of identity for the accused was not there because the parties have enemical terms. They are residing in the same locality and they were knowing each other since

years. It is also not a matter of dispute that the injuries found on the body of the present accused have been or might have been caused with all probabilities in the same transaction of the incident. They were knowing each other and the time of incident is 7.30 a.m. So, there was sufficient light and some of the injuries found on the persons injured examined as witnesses were not possible by self infliction. In the case of Panubhai @ Paniyo Kelaji Bhil (supra), the facts were materially different. The observation made in para 14.4 are indicating but this indication is not exhausting. It is possible that the injuries may be by fall or any other reason. Such injuries cannot be said to be self inflicted injuries. Even the witness can sustain grievous hurt such as fracture etc. If it is found that the injured witness had divulged half truth, then whether such injured witness should be accepted as trustworthy is also a question and that question has to be appreciated appropriately. If the court found that the injured witness who has been brought before the court to prove the case of prosecution is trying to put the curtain on certain important aspects of the transaction to the incident that had occurred and, therefore, his version / credibility is

at stake, then it would be unsafe to place reliance on the evidence of such witness or witnesses unless it is possible for the court to separate the grain and chef. We are aware that *"falsus in uno, falsus in omnibus"* is not the accepted principle of law in our Criminal Jurisprudence but the true fact and the falsity, if are found separable, then only that exercise should be done by the Court is the law settled by the Apex Court. In the present case, learned trial Judge, on appreciation of written arguments placed at the conclusion of the trial and the written explanation given by accused nos.1,2 and 4, has observed that defence probablised. So, according to us, this is not a case where the learned trial Court has not discarded the evidence of the injured witness saying that they are telling truth before the Court but their version has not been found trustworthy by the learned trial Judge as the learned trial Judge found that they are divulging half truth and have attempted to put curtain on very material and relevant aspects of the incident and for doing so, the learned trial Judge has recorded number of contradictions found in the depositions of these witnesses including P.W.9 departmentally related to the deceased.

16. We have carefully gone through the contradictions noticed by the learned trial Judge and narrated witness-wise in the judgment and it is true that some of the contradictions are not of importance in nature but some contradictions are found according to us, of serious conflict. There is a clear distinction between contradiction and omission resulting into contradiction. As stated by the Apex Court in the case of Bhagwan Singh V/s The State of Punjab, reported in **AIR 1952 SC 214,** it is duty of the Court to see that witness is given fair chance to explain about improvements that he has made before the Court and as we have gone through the depositions of these witnesses, we are satisfied that all fair chances were offered to these witnesses to explain about improvements that they have made in the depositions before the Court. When the Court found that witnesses and that too the injured witnesses have made some improvements, then impact of the improvements on the story of the prosecution needs careful evaluation. If it is found sheer exaggeration, the Court can ignore it in the fact finding mission, but if it is found modulation done with a view to make important improvements in the

story, then contradiction coming up in the nature of omission should be viewed seriously especially when the case of the accused is no more a case of denial when the accused placed specific plea of defence and tried to raise doubt about trustworthiness of the witnesses by placing some evidence collected during the course of investigation, then before accepting the version of the injured witness or witnesses, the Court is bound to consider whether plea placed by the accused probablised ? In the present case, learned trial Judge has not believed the injured witness because their style of telling truth before the Court is not found sufficient to link the accused in the crime.

17. The learned trial Judge has rightly appreciated the nature of injuries that were found on the bodies of the persons of the accused i.e. Accused no.1 Ali Mamad Ismail, accused no.2 Noormamad Ismail and accused no.4 Jusab Ismail. These 3 accused persons are real brothers and it is the say of accused no.1 that when he was proceeding towards the Maternity Home to see newly born baby child delivered by his wife on the previous evening of 21st October, 1984, he was intercepted and assaulted and his motor-

cycle was damaged, then obviously if real brothers are residing in the vicinity may rush to rescue his brother i.e. accused no.1. So, the presence of accused nos.2 and 4 at the spot of incident is not found of the persons of criminal. Their presence otherwise ought to have been at some other place is also not infavourable because they are residing in the same area. On the other side, excluding two females six male members were there including sisters and considering the nature of injuries found on the bodies of the injured witnesses, it is clear that they must have actively participated in the incident. There was no reason for any of the accused to carry weapon with them. The trial Court has rightly appreciated one fact that the person probably proceeding to Maternity Home in the early hours would not have started from his residence with any weapon like iron pipe. The injuries that have been found are possible by any hard and blunt substance and not necessarily by iron rod. There is clear distinction between the iron rod and iron pipe and the witnesses were competent to make distinction between iron rod and iron pipe and considering the opinion expressed by Dr.Kesrani, it appears that no blow of iron pipe with heavy hand was given on the head of the

deceased, otherwise, the deceased must have sustained fracture on skull. On the contrary, it is found that both the injuries that were noticed initially by Dr.Kesrani were simple in nature but that two injuries being head injuries and with the history of some uneasiness, he was admitted in the hospital. The defence has also successfully brought one circumstance on record that the complainant's side are related to the person who is serving with the Government hospital. It also emerging from the record that the person was also found sitting in the court room during the trial and he was identified by one of the witnesses (medical officer - examination).

18. The accused nos.1, 2 and 4 on account of injuries sustained by them were treated by the Government hospital and Dr.Parekh, who had examined these accused persons, has described injuries on three accused in his deposition Exh.56. The accused no.1 had the following injuries. (1) Contusion admeasuring 10 cm x 4cm on the right side shoulder back on scapular region. (2) Contusion 2 cm x 4 cm on the back side of left shoulder on scapular region, and (3) Contusion 1 cm x 1 cm on the center of nose. According to Dr.Parekh, the recovery would take 7 to

10 days. The certificate is at Exh.58.

19. The accused no.2 had two injuries i.e. (1) Swelling admeasuring 5 cm x 2 cm on the left wrist joint and (2) Contusion admeasuring 3 cm x 1 cm on the back of the right shoulder. The injury certificate is at Exh.59.

19.1 The accused no.4 was having two injuries i.e. Contusion admeasuring 8 cm x 2 cm i.e., back portion of left shoulder scapular region and (2) contusion admeasuring 1 cm x 1 cm on the middle of nose. These injuries were fresh and co-relatable with the time of incident.

20. The learned trial Judge has observed that the complainant's side ought to have explained the injuries sustained by the accused. In all cases, it is not necessary that only visible injuries are required to be explained. Further, two injuries, one on the body of the accused no.2 and the other on the body of accused no.4 that were found on nose could have been explained by the accused. The learned trial Judge has positively observed that the injuries that were on the back portion of the shoulder in the

specular region are not capable of self inclination. The conduct of accused side of reporting the incident in couple of minutes was required to be appreciated in correct spirit. When the case of self defence even not specifically pleaded if emerging from the total evidence led by the prosecution, then the Court, while dealing with the point of guilty of the accused, shall have to appreciate that aspect and on plain reading of the judgment, it is clear that the learned trial Judge has appreciated all relevant aspects.

21. We are in agreement with the say of Mr.Shah that in such or similar cases, the prosecution is not supposed to prove the motive, but because the motive is always hidden in the mind of the accused, but when it is pleaded, then substantially that motive has to be proved by leading substantially probable evidence. In the present case, the prosecution was not certain about motive. At one place, it is stated that there was quarrel in the previous evening between the females of two families and, therefore, the incident occurred. It is also pleaded that accused No.1 just to favour accused No.5 had erected cement pipe / pole and it was obstruction while making entry in the

plot, the end of the complainant's side. This part of motive pleaded by the prosecution, according to us, affects obviously to the case of the prosecution because wrong doers have already done that wrong by erecting cement pillar. So, offending side should be the other-side i.e., complainant's side and when accused No.1 says that he was intercepted, then possibly feelings offended by the act done by accused No.1, he was intercepted and then assaulted. It has also come on record that terms were enemical between those two families and, therefore, demand of plot from the municipality was resisted by the accused side and the accused side had created fencing and on that count, demand of the complainant' side was turned down by the Chief Officer of Bhuj Municipality. So, animosity between two families was persistent on the date of incident and this enemical terms between two parties cut the case both-wise. It may tilt balance in favour of the prosecution or in favour of the accused. When the incident has occurred on the public road, whether independent witnesses could have been examined by the prosecution is also a question and it appears that, no independent and reliable witness is examined by the prosecution. When the learned trial Judge found

that actual account of prosecution is not available with him and the defence probablised, he has decided to acquit the accused.

22. In response to the query raised by the Court, when it was argued by Mr.Shah that the accused could have been convicted for the offence punishable under Section 325 for causing injuries to Mariyam and under Section 307 for injuries inflicted on the head of Umar Osman, it is argued that unless it is found that the accused had exceeded the right of self defence and excessive force than required was used, only then the accused can be linked with this crime and that injuries found on Mariyam are possible by fall. It was not safe for the trial Court, according to us, to link the concerned accused by applying the principle of minimum liability. It appears that initiation of the story unfold by the prosecution itself is found doubtful. There was no need for the deceased to go to the public toilet and the place where the motor-cycle was lying vis-a-vis the place where the accused had sustained injuries and he had fallen down. There is material conflict and there was no need for the injured to go towards the place where the motor-cycle was lying. As observed by us earlier,

no plastic container was found at the time of drawing of scene of the offence panchanama. One may not found water, but its container could have been found. The Investigating Officer has not even cared to see, whether the public toilets are in working condition and the toilets that are available in the residence of the complainant side are actually not usable. On the contrary, according to us, there is ample force in the defence plea.

23. It is rightly argued by Mr.Anandjiwala that the learned trial Court has observed correctly that accused no.5 probably was not present at the spot of incident. Undisputedly, he is a resident of village Sukhpur and he is running cement pipe factory in the open land near Jyesthanagar. Two accused persons have been employed by him and they are taking care of the area owned by accused no.5. Sukhpur is a village situated at some distance from the town Bhuj and how and why accused no.5 would be there at the spot of incident is a question. It is not the case of the prosecution that assault on the accused was planned assault under the conspiracy. Only then accused no.5 would have reached to the spot in advance as no injury was found on the body of accused no.5 even

though he was active participant in the entire incident making his presence doubtful at the spot of incident. In the same way, physical presence of accused no.3 is also found doubtful as no injury was seen on his body, otherwise, he would have also sustained injuries. He was serving with the Gujarat Electricity Board at the relevant point of time and he being in semi-government service, it appears that the complainant's side was tempted in naming him as accused as terms between the parties were enemical since long.

24. As we have observed that the incident must have started as and when the accused no.1 was intercepted when he was proceeding towards the hospital. At that time also, deceased or any person from the complainant's side who have sustained injuries must not be expecting accused no.1 proceeding towards hospital. So, the event that has occurred is not planned, it appears to be sudden and that sudden event appears to be converted into scuffle between two groups. Three brothers on one side and the family members of the deceased on the other in the early morning on 22nd October, 1984 and the accused when have prayed their plea of either of

private defence or victim of assault made on accused no.1, then the medical evidence presumed importance automatically. The cause of death, therefore, according to us, has been rightly appreciated and held that it is not safe to link the accused with the offence merely because the cause of death is extraneous to the other two injuries that were found at the time of initial examination of deceased Mamad. The doctor has found that some rupture in the vital artery which is found in the central part of the brain was the cause for profuse bleeding. The blood was not able to come out though there was drainage pipe put by the Surgeon after completion of the surgery. So, according to us, it is doubtful to say that the deceased succumbed to the injuries because of two injuries that were noticed at the time of initial examination by Dr.Kesrani. Therefore, only learned APP has argued that the accused at least could have been linked with some lesser offence than punishable under Section 302, but in view of the above discussion, when the defence of the accused is found probable, it was not safe for the trial Court to convict the accused for any lesser offence.

25. As observed by the Apex Court in the case of

Betal Singh V/s State of M.P., reported in **AIR 1996 SC 2770,** the Court dealing with the acquittal appeal should not try to replace its own reasons while appreciating the evidence and the conclusion as to credibility of the witness especially when the finding is recorded by the Judge who has conducted the trial. It is true that the Court hearing the acquittal appeal can reach to its own conclusion and record that the evidence disbelieved by the trial Court could have been accepted by the trial Judge except on the point of demeanour of witness and while doing so, the appellate Court also should not give undue importance to travel contradiction but when improvements made by the witnesses resulting into material contradictions is a creator of infirmity in the case of structure of the prosecution and the appreciation of evidence of one witness can be found relevant while appreciating the evidence of other witnesses on the same sets. It is observed by the Apex Court in the above cited case of Betal Singh (Supra)that unless it is found that the finding recorded by the trial Judge is palpably wrong, reversal of finding would not be justifiable. No explanation as to origin of the occurrence vis-a-vis injuries found on the accused makes the version vague

as observed by the Apex Court in the case of State of Karnataka V/s Shrisail Sateeppa Karkalamethi and others, reported in **AIR 1994 SC 1244.** It is observed in more than one decisions by this Court and the Apex Court that when it comes to ocular evidence of highly interested witness and when there is no full corroboration of the medical evidence, then it would not be safe for the Court to accept the evidence of this witness as a gospel truth. According to us, that principle has been applied by the trial Court in the present case. We would like to reproduce relevant paragraphs 7 and 15 of the decision in the case of Ramesh Babulal Doshi V/s State of Gujarat, reported in **AIR 1996 SC 2035** because according to us though the facts of this case are materially different but the ratio positively would help the defence side.

> “7. The mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly

untenable. While sitting in judgment over an acquittal the appellate Court is first required to seek an answer to question whether the findings of the trial Court are palpably wrong, manifestly erroneous or demostrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then – and then only – reappraise the evidence to arrive at its own conclusions.

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15. Where the trial Court had given clear, cogent and convincing reasons for disbelieving evidence of the prosecution witnesses in a murder trial, the High Court would not be justified while reversing the acquittal by reappraising the evidence and not even considering the findings of the trial court or demonstrating that they were not sustainable at all."

26. In the same way, in the case of Dhanna etc. V/s State of M.P., reported in **AIR 1996 SC 2478,** the Apex Court has observed thus :

> “Though the Code does not make any distinction between an appeal from acquittal and an appeal from conviction so far as powers of the appellate Court are concerned, certain unwritten rules of adjudication have consistently been followed by judges while dealing with appeals against acquittal. No doubt, the High Court has full power to review the evidence and to arrive at its own independent conclusions whether the appeal is against conviction or acquittal. But while dealing with an appeal against acquittal the appellate Court has to bear in mind : first, that there is a general presumption in favour of the innocence of the person accused in criminal cases and that presumption is only strengthened by the acquittal. The second is, every accused is entitled to the benefit of reasonable doubt regarding his guilt and when the trial Court acquitted him he would retain that benefit in the appellate Court also. Thus, appellate Court in appeals against acquittals has to proceed more cautiously and only if there is absolute assurance of the guilt of the accused, upon the evidence on record, that the order of acquittal is liable to be interfered with or disturbed.”

27. P.W.19, who is Talati-cum-Mantri, has come forward to depose that he is the witness to the

incident. According to us, his evidence has also been rightly appreciated because he is residing at the big distance place. There is open parcel of land between his residence and the place of incident and there are number of trees in between and it is not possible for him to see the actual occurrence unless he reached or goes to the place where the scuffle has taken place. The prosecution has attempted to establish that unarmed man going towards the public toilet to reply the call of nature was ruthlessly assaulted by three accused persons but when on evidence, it is found doubtful and it appears that simultaneously that witnesses are suppressing some part of the story, then recording of acquittal cannot be said to be either perverse or illegal. It is settled legal position that unless the Court finds that the finding recorded by the trial Court are perverse or palpably illegal or is based on palpably wrong appreciation of evidence, the acquittal should not be disturbed.

28. It is also relevant to note that if the Court found that accused no.5 was not there at the time when the incident occurred who had died pending this appeal on 1st September, 2001, none of the accused could have been linked with the offence of

rioting punishable under Sections 147, 148 and/or 149 of IPC. The presence of accused no.3 is also found doubtful. So, the question of forming of unlawful assembly does not arise. In the same way, the evidence as to the alleged threat given to the complainant's side and they were asked not to lodge the formal complaint is also not found genuine because the document Exh.76 on the contrary proves that the accused themselves had informed the police about the incident. That gesture by itself would have been sufficient to initiate any criminal proceedings against the accused persons.

29. This totality takes us to the conclusion that there is no merit in the appeal and, therefore, the same deserves to be dismissed and accordingly dismissed. The impugned judgment passed by the learned Sessions Judge acquitting the respondents accused is hereby confirmed. The accused are on bail. Therefore, their bail bonds shall stand discharged.

(C.K.BUCH, J)

(SHARAD D DAVE, J)

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